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No. 91-498

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

[illegible] CITY HOUSING AUTHORITY, [illegible], JOHN ARAKEL, [illegible] LIEBERMAN, [illegible], CYRIL [illegible] and RITA COSS,

Petitioners,

v.

CATHERINE OWENS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

RESPONDENT CATHERINE OWENS' BRIEF AND APPENDIX IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should overlook prudential concerns of efficiency and expediency and take jurisdiction over this interlocutory appeal, when the disposition of the district court after remand might render the appeal moot.

2. Whether the court of appeals properly reversed the district court's holding that a state court ruling collaterally estopped respondent from producing evidence on an element of her prima facie case, when the issue ruled on by the state court was not identical to the issue in respondent's prima facie case and when New York State law would not have collaterally estopped respondent from producing evidence on that issue.

3. Whether the court of appeals properly reversed the district court's holding that the court had no jurisdiction over respondent's claim of retaliation that had not been filed with the Equal Employment Opportunity Commission ("EEOC"), when the retaliatory act occurred explicitly in response to the filing of the EEOC charges and the unfiled retaliation claim was reasonably related to the previously filed charges of discrimination.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption.

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In The
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No. 91-498

NEW YORK CITY HOUSING AUTHORITY, HENRY BRESKY, JOHN ARAKEL, LEO LIEBERMAN, LARRY LEFKOWITZ, CYRIL GROSSMAN and RITA COSS,

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RESPONDENT CATHERINE OWENS' BRIEF IN OPPOSITION

Respondent Catherine Owens ("Owens") opposes granting the Petition of the New York City Housing Authority (the "Housing Authority") for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Walker, J., joined by Oakes and Wexler, JJ.) is reported at 934 F.2d 405. Citations to the district court's opinions and

the New York Supreme Court's decision are set forth in the Petition.

JURISDICTION

Discretionary jurisdiction of this Court to review the interlocutory judgment of the United States Court of Appeals for the Second Circuit entered on May 21, 1991, rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In addition to the statutes cited in the Petition, the following statutes are cited herein:

29 U.S.C. § 623(d) states:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

42 U.S.C. § 2003e-3 states:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

N.Y. Civ. Prac. L. & R. § 7803(3)-(4) (McKinney 1981) states:

> The only questions that may be raised in a proceeding under this article are:
>
> * * *
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion,

including abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

STATEMENT OF THE CASE

This is an age discrimination case brought by Catherine Owens, who at the age of 54 was fired from her job at the New York Housing Authority and replaced with a much younger person. When Ms. Owens filed her discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"), petitioners retaliated against her by breaking off settlement negotiations over charges that had been brought against her, charges that Ms. Owens claimed were motivated by discriminatory animus. The district court has held that Ms. Owens raised genuine factual issues precluding summary judgment on the merits, but dismissed her complaint on procedural grounds. The Second Circuit subsequently reversed, and that reversal is the subject of this appeal.[1]

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[1] Owens for her narrative Statement of the Case adopts by reference the statement of facts in the opinion below, Owens v. New York City Housing Authority, 934 F.2d 405, 406-08 (2d Cir. 1991) ("Owens III"), Petition at A2-A6, and the statement of facts in the district court opinion, Owens v. New York City Housing Authority, No. 84 Civ. 4932, slip. op. at 1-4 (S.D.N.Y. July 31, 1987) ("Owens I"), Petition at A25-A27. Respondent further corrects the inaccuracies and omissions in the Petition concerning the holdings and results in the district court and in the court of appeals decisions below.

The issues in the Petition are not ripe for review by this Court. Owens instituted these proceedings pro se by filing a complaint through the pro se clerk of the United States District Court of the Southern District of New York on July 6, 1984. Present counsel was appointed from the Southern District's pro bono panel on February 4, 1985. Petitioners' first motion for summary judgment was denied in its entirety in 1987. Owens I, slip. op. at 15, Petition at A35. Petitioners' second motion for summary judgment was granted and respondent's case was dismissed in Owens v. New York City Housing Authority, No. 84 Civ. 4932, slip op. at 14 (S.D.N.Y. April 23, 1990) ("Owens II"), Petition at A24. The United States Court of Appeals for the Second Circuit reversed the district court and remanded for further proceedings not inconsistent with the court's decision. Owens III, 934 F.2d at 411, Petition at A12.

A. The Lower Court Holdings On The Merits Of Owens' Claims

Owens' complaint asserts two claims: (1) that petitioners engaged in discriminatory treatment leading to respondent's termination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), and (2) that petitioners engaged in employment actions against her in retaliation for her filing of a complaint with the EEOC, in violation of ADEA, 29 U.S.C. § 623(d), and of Title VII, 42 U.S.C. § 2000e-3(a).[2] Owens I, slip op. at 1, Petition at A25.

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[2] Owens' complaint originally asserted additional claims under Title VII that were dropped after the first round of (continued...)

Petitioners first moved to dismiss Owens' complaint for failure to state a claim and because she was barred by the doctrine of res judicata from pursuing her age discrimination claim. The motion was denied in its entirety by the district court in Owens I. Owens I, slip op. at 15, Petition at A35.

1. **The Age Discrimination Claim**

With respect to the age discrimination claim, the district court held that Owens had presented sufficient evidence to preclude summary judgment over the issue of Owens' qualification for her job, the only disputed element in Owens' prima facie case under the test enunciated by this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Petitioners relied on the substance of disciplinary charges that had been lodged against Owens on June 14, 1983, and which were the basis of the administrative hearing decision which led to Owens' discharge from the Housing Authority. The district court held that the charges did not demonstrate that Owens was unqualified for purposes of her prima facie showing under McDonnell Douglas, because the charges primarily related to misconduct, rather than competence, and such charges of misconduct were suspect because lodged by her supervisors,

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[2](...continued)
discovery and prior to the first motion for summary judgment. Owens I, slip op. at 1, Petition at A25. Because the retaliatory action of the Housing Authority had been directed at Owens' EEOC claims under both Title VII and ADEA, her retaliation claim under Title VII continues even though the underlying Title VII claims were voluntarily withdrawn by Owens. See id.

petitioners John Arakel and Lawrence Lefkowitz, the very persons who had discriminated against Owens and who had made disparaging remarks about Owens' age and "entry into menopause." See Owens III, 934 F.2d at 408, 410, Petition at A5, A9.[3]

Further, both the district court and the court of appeals explicitly found that Owens had successfully called into question the legitimacy of those disciplinary charges by challenging her supervisors' motivation for lodging the charges against her. Owens III, 934 F.2d at 410, Petition at A9.

2. **The Retaliation Claim**

Despite a long record of complaints about her supervisors to a mediation agency, Housing Authority administrators and the internal office of equal employment opportunity, disciplinary charges were lodged against Owens on June 14, 1983. Two weeks later, on June 27, 1983, Owens pro se filed charges of discrimination with the EEOC. At the heart of her EEOC complaint was the claim that the disciplinary charges lodged against Owens by the Housing Authority were motivated by the discriminatory intentions of her supervisors. The EEOC charges did not include a claim of retaliation. Petition at A87-A88.

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[3] In holding that Owens had made a prima facie showing of qualification, the district court relied on evidence that Owens had performed satisfactorily throughout her six year tenure as a Housing Assistant for the Housing Authority except for period when she was under the supervision of petitioners Arakel and Lefkowitz. Owens I, slip op. at 8, Petition at A30.

When the Housing Authority learned that Owens had filed an EEOC complaint, the attorney for the Housing Authority retaliated against Owens: As described by the district court:

> Moreover, Owens offers direct evidence that the Housing Authority decided not to offer her a plea bargain because she filed the charges with the EEOC. Michael Shen, who represented Owens at the disciplinary hearing, swears that he met with the Housing Authority attorney Jerome Weisberger in August, 1983 to discuss a plea bargain that presumably would have preserved Owens' job. At a second meeting later that month, however, Weisberger "stated that because Owens had filed charges with the [EEOC] against the Housing Authority, plea bargaining was no longer a possibility."

Owens I, slip op. at 6, Petition at A29 (citation omitted).

B. The District Court's Second Opinion And The Reversal By The Court Of Appeals

The court of appeals reversed the district court's holding that Owens was precluded by a state court decision confirming a finding of misconduct by a Housing Authority administrative officer. The court of appeals held that there was no identity of issue -- a requirement for the application of the issue preclusion doctrine -- between the state court issue of misconduct and the issue of job qualification under the McDonnell Douglas prima facie case test.

> We have no doubt that such misconduct may certainly provide a legitimate and non-discriminatory reason to terminate an employee. This misconduct is distinct, however, from the issue of minimal qualification to perform a job. An individual may well have the ability to perform job duties, even if her conduct on the job is inappropriate or offensive.

Owens III, 934 F.2d at 409, Petition at A7-A8.[4]

The district court also held in Owens II that it could not hear the retaliation claim because Owens had not filed it with the EEOC and it was not related to her EEOC complaint. In making this determination, the district court failed to properly apply the reasonable relationship test established by the Second Circuit in Kirkland v. Buffalo Board of Education, 622 F.2d 1066 (2d Cir. 1980) (per curiam); Petition at A20-A23. Moreover, the district court failed even to consider the controlling precedent of Goodman v. Heublein, Inc., 645 F.2d 127 (2d Cir. 1981), wherein the Second Circuit had "held that plaintiff's claim that he was transferred out of the country in retaliation for his EEOC complaint alleging age discrimination in the failure to promote him was 'reasonably related' to the complaint." Owens III, 934 F.2d at 411, Petition at A11 (citation omitted). The reversal of the district court on this point required little comment by the court of appeals.

REASONS FOR DENYING THE WRIT

The court of appeals correctly reversed the erroneous decision of the district court on all grounds and remanded the case for further proceedings on respondent's claims of age

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[4] In making this determination, the court of appeals relied on the district court holding that Owens had made a prima facie showing of qualification. This conclusion was based on the evaluations of Owens' work during her four years at the Housing Authority when she was not under the supervision of "Arakel and Lefkowitz, whose relationships with Owens was admittedly poor." Owens III, 934 F.2d at 408, 410, Petition at A5, A9.

discrimination and retaliation. This interlocutory judgment of the court of appeals is not ripe for review by this Court, may be rendered moot by the disposition of the district court on remand, and presents no extraordinary reason for this Court to ignore prudential concerns of economy and efficiency which militate against granting certiorari to review an interlocutory judgment.

In the first place, the court of appeals' decision that the lower court erred in holding that respondent was collaterally estopped from proving her prima facie case of age discrimination is consonant with the other courts of appeals that have reviewed this issue. Petitioners nevertheless argue that a summary affirmance by a state court of an administrative decision of misconduct should preclude respondent from proffering evidence necessary to state a prima facie claim of discrimination under the test established in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). This argument is unworthy of review, since 1) the issue of respondent's misconduct for disciplinary reasons was not identical to the issue of prima facie qualification for her job under McDonnell Douglas, and 2) New York state courts would not preclude respondent from pressing her age discrimination claim in another New York state court proceeding. Moreover, petitioners' argument is contrary to numerous prior decisions of this Court, for it is based on a mischaracterization of the requirements for a prima facie showing of "qualification" which, if adopted by this Court, would eviscerate this Court's decisions in McDonnell Douglas and its progeny.

In the second place, the court of appeals correctly determined that the district court erred in refusing to find jurisdiction over respondent's retaliation claim arising out of actions taken directly in response to respondent's filing of her complaint with the EEOC. Although the retaliation claim, which arose after respondent's original EEOC filing, was never separately filed with the EEOC, the court of appeals properly held that the claim was reasonably related to respondent's original EEOC filing and thus came within the jurisdiction of the district court. The court of appeals' reversal was based on the choice and application of the "reasonable relationship" standard, a standard that is consonant if not identical to the standards applied in every other circuit in the country. Petitioners' mischaracterization of the standard applied by the court of appeals as the rule that an "unfiled retaliation claim, as a matter of law, may [sic] be a part of the plaintiff's judicial complaint," Petition at 20, is at odds with the language and reasoning of the court of appeals' decision.

POINT I

THE INTERLOCUTORY COURT OF APPEALS DECISION IS NOT YET RIPE FOR REVIEW BY THIS COURT

The court of appeals has reversed and remanded the case at bar for further proceedings by the district court. Petitioners seek certiorari to review an interlocutory order. This Court, as a matter of efficiency and expediency, has traditionally refused to hear cases of an interlocutory nature,

declaring that the "fact [of the interlocutory nature of the decision below] itself alone furnished sufficient ground for the denial of the application." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). Accordingly, this Court has held that because "the Court of Appeals remanded the case, it is not yet ripe for review by this Court." Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967). Only in cases where the decision of the Court has a fundamental effect on the standards that will be applied in the review of the merits of the case has certiorari been granted to non-final decisions. Michael v. United States, 454 U.S. 950 (1981) (appeal of interlocutory order dismissed); see United States v. General Motors Corp., 323 U.S. 373, 377 (1945) (interpretation of constitutional provision fundamental to determination below on merits); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949) (determination of jurisdictional question dependent on outcome of merits).

The present case is neither ripe for review nor is its furtherance dependent on the resolution of the issues asserted in the Petition. Neither of the Second Circuit's determinations will fundamentally affect the district court's review of the merits of Owens' claims.

Moreover, if the district court does proceed to the merits and a final judgment unfavorable to petitioners is issued and affirmed, petitioners may at that time seek review from this Court. Petitioners are in no way harmed by a denial of the

Petition because such a denial is without prejudice and, assuming the issues are properly preserved, renewal of the questions presented at a later and more appropriate stage of the proceedings is always available to petitioners. See Christianson v. Colt Indus. Operative Corp., 486 U.S. 800, 817 (1988) (petition for writ of certiorari exposes entire case to review); Urie v. Thompson, 337 U.S. 163, 172-73 (1949); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 672 n.19 (1979).

As this Court has stated, the most important competing considerations when determining whether a court of appeals should review a non-final decision under 28 U.S.C. § 1291 are "'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964) (citation omitted). In the case at bar, review by this Court at this time serves neither consideration. The cost and inconvenience of allowing petitioners to obtain review of such preliminary matters places a heavy burden on the Title VII/ADEA grievant before the Court. Indeed, allowing review at this preliminary stage only adds to the enormous delay already borne by Owens who has been forced to wait over seven years for an adjudication of her claims on the merits. Since the opportunity for review by this Court can be preserved by petitioners, there is no danger of denying justice to them by a denial of the writ on this Petition.

POINT II

THE COURT OF APPEALS PROPERLY DETERMINED THAT OWENS WAS NOT COLLATERALLY ESTOPPED FROM PRESENTING A PRIMA FACIE CASE OF AGE DISCRIMINATION, AND NO SPECIAL CIRCUMSTANCES JUSTIFY FURTHER REVIEW BY THIS COURT

The court of appeals was correct in reversing the district court's decision that Owens was not collaterally estopped from satisfying her prima facie burden of demonstrating her qualification for the position from which she was dismissed. In reaching this holding, the court of appeals applied the correct legal standards, both with respect to New York's collateral estoppel doctrine and with respect to the appropriate standard for showing qualification.

Contrary to petitioners' assertions, the court of appeals more than adequately addressed the issue of what factors disqualify an incumbent employee from continued employment. In addition, the standard for determining qualification applied by the court of appeals is consistent with the "employer's reasonable expectations" test applied both by other circuits and by the Second Circuit in prior decisions. Moreover, the standard petitioners propose, in order to preclude Owens from the opportunity to prove her case, is unsupported even by the cases cited in the Petition and is contrary to the well-established teachings of this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

A. The Court Of Appeals Correctly Held That Plaintiff Was Not Collaterally Estopped From Proving That She Was Qualified For The Position From Which She Was Terminated

In reaching its decision on Owens' ADEA claim, the court of appeals applied the correct legal standards, both with respect to New York's collateral estoppel doctrine and with respect to the meaning of qualification under that test, and no special circumstances are present which justify further review by this Court. The issue before the court of appeals was limited to the correctness of the district court's decision that Owens was collaterally estopped from presenting a prima facie case of age discrimination under the McDonnell Douglas test.[5] Owens III, 934 F.2d at 408; Petition at A6 (Housing Authority's cross-appeal on merits of prima facie showing deemed abandoned).

New York State law determines the issue preclusive effect of the prior state judgment on Owens' ADEA claim. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 381 (1985). New York law requires that the issue presented in the later action be identical to the issue decided in the earlier adjudication, and resolution of the issue must have been necessary. In addition, there must have been "a full and fair opportunity to contest the decision now said to be controlling." Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969); see also D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 665-66, 564 N.E.2d 634, 638, 563 N.Y.S.2d 24, 28 (1990).

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[5] The McDonnell Douglas test is regularly applied to ADEA actions. See, e.g., Montana v. First Fed. Sav. & Loan Ass'n, 869 F.2d 100, 103 (2d Cir. 1989).

McDonnell Douglas requires a plaintiff alleging discriminatory termination to satisfy an initial prima facie burden by showing that (1) she is within the protected class; (2) she is qualified for the position; (3) she has been terminated from her job; and (4) that a younger individual has replaced her.[6] Id. The burden of establishing a prima facie case of discrimination, which constitutes only the first stage of the three-stage McDonnell Douglas test, "is not onerous." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).[7]

Petitioners argued to the court of appeals, as they do to this Court, that the state court confirmation of a Housing Authority administrators' finding of misconduct precludes respondent from establishing her prima facie qualification and

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[6] A minimal showing of qualification is required by the McDonnell Douglas test, but the McDonnell Douglas requirements may not be necessary where there is direct evidence of discrimination. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) ("importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act"). Respondent argued that she had presented sufficient direct evidence to the court of appeals, which did not need to reach the issue since it overturned the lower court's collateral estoppel holding. Owens III, 934 F.2d at 409, Petition at A8.

[7] The ease with which a plaintiff may demonstrate a prima facie case ought not to be confused with plaintiff's ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against plaintiff. This burden remains at all times with the plaintiff. See infra pp. 22-23.

bars her from introducing other evidence of qualification. The court of appeals correctly rejected this argument, holding that the issue of misconduct before the state court which reviewed Owens' disciplinary hearing "was not the same as the one said to be precluded -- job qualification." Owens III, 934 F.2d at 409, Petition at A7. While it recognized that one of the fourteen disciplinary charges at the disciplinary hearing concerned competence, the court of appeals noted that "the finding of incompetence was clearly not necessary to the hearing officer's conclusion that discharge was an appropriate sanction," and thus was "without preclusive effect." Owens III, 934 F.2d at 409 n.2, Petition at A8 n.2. The court of appeals also noted that the state court did not mention the competence charge; rather, it upheld the discharge on the grounds of "misconduct" and "gross insubordination." Owens III, 934 F.2d at 409, Petition at A7-A8. The court of appeals determined that the state court could not have, and in fact did not, pass on Owens' competence to perform her work and that the state court had made no findings as to whether Owens' was qualified for her position.[8]

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[8] Article 78 of the New York Civil Practice Law and Rules, the statute pursuant to which the state court reviewed the disciplinary hearing, strictly limited that court's standard of review of Owens' administrative proceeding to issues of whether the administrative determination was made in violation of lawful procedure, was arbitrary or capricious or an abuse of discretion, or was not supported by substantial evidence. N.Y. Civ. Prac. L. & R. § 7803(3)-(4) (McKinney 1981). Owens III, 934 F.2d at 410, Petition at A9-A10.

In making its determination, the court of appeals correctly applied well-established New York law in holding that Owens was not collaterally estopped from proving her prima facie claim of discrimination. Courts applying New York law invariably have held that a state court affirmance of an administrative tribunal's findings of employee misconduct is not sufficient to preclude an employee from filing an action on a discrimination claim. Hill v. Coca Cola Bottling Co., 786 F.2d 550, 554 (2d Cir. 1986) (New York courts would not preclude district court Title VII action even where state court affirmed misconduct determination of unemployment review board which had discrimination claim before it); DeCintio v. Westchester County Medical Ctr., 821 F.2d 111, 116 n.8 (2d Cir.), cert. denied, 484 U.S. 965 (1987) (Title VII claim not precluded despite finding pursuant to Section 75 hearing of misconduct and incompetence); State Div. of Human Rights v. Syracuse, 57 A.D.2d 452, 394 N.Y.S.2d 948 (4th Dep't 1977), aff'd mem., 43 N.Y.2d 958, 375 N.E.2d 409, 404 N.Y.S.2d 343 (1978) (permitting appeal from determination of State Human Rights Appeal Board even though complainant had lost previous state court challenge to results of disciplinary hearing); Board of Educ. of the Manhasset Union Free School Dist. v. New York State Human Rights Appeal Bd., 106 A.D.2d 364, 366, 482 N.Y.S.2d 495, 497 (2d Dep't 1984) (since "full and fair opportunity to litigate racial slur allegation . . . was not afforded complainant . . . neither [the doctrines of] res judicata nor collateral estoppel" should be applied).

As the court of appeals recognized, Owens' misconduct may provide a legitimate and non-discriminatory reason to terminate an employee. This misconduct is distinct, however, from the issue of prima facie qualification to perform a job. "An individual may well have the ability to perform job duties, even if her conduct on the job is inappropriate or offensive. Accordingly, the finding of misconduct here cannot preclude Owens from showing her qualification for employment as required by McDonnell Douglas." Owens III, 934 F.2d at 409, Petition at A8. Accordingly, the state court determination did not preclude respondent from making out her prima facie case on claim preclusion grounds.

The Petition fails to cite any cases holding that a plaintiff may be collaterally estopped by a determination of misconduct outside the forum of a discrimination action. Indeed, the case law is to the contrary. The Third Circuit's decision in Jalil v. Avdel Corp., 873 F.2d 701 (3d Cir. 1989), cert. denied, __ U.S. ___, 110 S. Ct. 725 (1990), is factually identical to the case at bar, and congruent with the Second Circuit's holding. Jalil involved a plaintiff, who, like Owens, was fired for "gross insubordination" and unsuccessfully challenged his discharge before an arbitrator, who found in favor of the employer. A New Jersey court affirmed the arbitrator's decision. Plaintiff subsequently brought suit in federal court, and appealed his dismissal on the grounds of collateral estoppel. Applying the same reasoning as the court of appeals, the Third Circuit

reversed, holding that a state court summary affirmance of an administrative finding of "gross insubordination" did not collaterally estop plaintiff from proving qualification. Id. at 707. Accordingly, no novel issue is raised by the Second Circuit's holding on issue preclusion, and the writ should not be granted with respect to it.[9]

B. The Standard Applied By The Court Of Appeals In Determining That Owens Was Not Collaterally Estopped From Proving The Prima Facie Element Of Qualification Is Consistent With The Test Of Other Circuits

The court of appeals used the correct standard of "qualification" to determine that Owens was not estopped from meeting her prima facie burden of showing same. There is in fact no conflict between the decision of the court of appeals below and the test applied by the various circuits cited in the Petition.

Petitioners rely principally on Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979), and the other cases which stand for the proposition that an employee's performance on the job should

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[9] Since the lack of identity of issues was dispositive in Owens' case, the court of appeals did not need to consider the issue of whether Owens had a full and fair opportunity to contest the issue of qualification in her Article 78 proceeding. Nonetheless, this is an alternative ground for rejecting petitioners' contentions which affords this Court another reason to deny the Petition. See, e.g., Hill v. Coca Cola Bottling Co., 786 F.2d 550 (2d Cir. 1986), holding it "unfair to penalize [a Title VII plaintiff] . . . for employing [New York] state [Article 78] procedures . . . [which] barely touched on [plaintiff's] discrimination claim." Similarly, see Delgado v. Lockheed-Georgia Co., 815 F.2d 641, 647 (11th Cir. 1987) (due to narrow focus of agency investigation, issue preclusion does not apply because plaintiffs did not have an adequate opportunity to litigate age discrimination claim).

be reviewed in deciding whether an employee has established her qualification for purposes of satisfying the McDonnell Douglas test in cases involving discharge, as opposed to hiring, decisions. Notwithstanding petitioners' assertions to the contrary, the court of appeals, and the district court in rejecting petitioners' first motion for summary judgment on this very issue, did in fact consider Owens' on-the-job performance, and not just the basic skills that qualified her to be hired in the first place.

The district court squarely addressed the issue of qualification in Owens I and found that Owens had made a satisfactory showing of qualification as part of her prima facie case. Owens I, slip op. at 7-10, Petition at A29-A32. This finding was based not only on Owens' demonstration that she had the "basic skills" which initially qualified her for the decision, but also on a careful consideration of the skills Owens exhibited during her six year work record as a Housing Assistant for the Authority. Owens I, slip op. at 1-4, Petition at A25-A27. The court of appeals relied upon the district court's prior factual determinations that Owens had satisfied her prima facie burden of demonstrating qualification:

> We note that in the first opinion denying summary judgment, the district court ruled that by presenting evidence of "competence," Owens had succeeded in raising a genuine issue as to her qualification for the job. The district court denied summary judgment to defendants on that basis. The conclusion was based on evaluations of Owens' work by individuals other than Arakel and Lefkowitz, whose relationship with Owens was admittedly poor.

Owens III, 934 F.2d at 409, Petition at A8. Contrary to petitioners' assertion, the test for qualification applied by the Second Circuit does not conflict with other circuits. Rather, the appropriate legal standard was followed and correctly applied in Owens.[10]

C. The Test For Qualification That The Housing Authority Would Have This Court Adopt Is Contrary To The Well-Established Precedent Of This Court

Petitioners fundamentally misunderstand the burden-shifting framework erected in McDonnell Douglas by failing to recognize and distinguish among the three different stages of proof under the McDonnell Douglas test. In the decisions below, both the district court and court of appeals have found on the merits that respondent has stated a prima facie case and raised a genuine issue of fact concerning pretext. Owens I, slip op. at 9-10, Petition at A31-A32; Owens III, 934 F.2d at 409-10, Petition at A7-A9. In order to avoid the import of these essentially unreviewable factual findings, petitioners have contrived a test pursuant to which petitioners, through allegations of misconduct, can at the prima facie stage of

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[10] Indeed, the court of appeals incorporated the standard for qualification used by the district court, which relied upon Meiri v. Dacon, 759 F.2d 989 (2d Cir.), cert. denied, 474 U.S. 829 (1985). Owens I, slip op. at 8, Petition at A30. It is not surprising that the Second Circuit followed Meiri, its own previous holding, in Owens III. What is surprising is that the Petition admits that Meiri states the correct rule but denies that the court of appeals applied Meiri in this case. Petition at 15-16. The decision below does not support petitioners' contention that the Second Circuit failed to follow its own precedent.

McDonnell Douglas preclude respondent from introducing any evidence to support her prima facie case. The effect of this maneuver is to forever preclude respondent from introducing evidence of pretext.

The McDonnell Douglas three stage test permits a plaintiff who can make out a prima facie case of discrimination to frame the issue of pretext for the court's review. In the first stage, a plaintiff's prima facie case creates a rebuttable presumption that the defendant unlawfully discriminated against the plaintiff. In the second stage, the burden shifts to the employer to rebut the proof of discrimination by articulating some legitimate, non-discriminatory reason for the employee's discharge. If the employer is able to demonstrate such reasons, the third stage of the test again shifts the burden to the employee to show that the articulated reason is pretextual.[11] Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 252-253. Pretext is therefore frequently an essential element of a claim of intentional discrimination.

The court of appeals' holding followed McDonnell Douglas and Burdine in allowing respondent the opportunity to

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[11] The essential purpose of the McDonnell Douglas division of "intermediate evidentiary burdens" is to "bring the litigants and the court expeditiously and fairly to the ultimate question." Burdine, 450 U.S. at 253. The allocation of burdens, the order of presentation of proof and the creation of a presumption by the establishment of a prima facie case were established to provide an analytical framework "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Id. at 255 n.8.

frame the issue of pretext in the instant case. Respondent had proffered sufficient evidence to the district court to make out her prima facie case, and petitioners tried but failed to rebut that showing because respondent raised a genuine issue of fact that petitioners' rebuttal was pretextual.[12]

Petitioners now seek certiorari to effect a change in the law under which an employer may preclude evidence of pretext by claiming that the employee has not met its legitimate expectations. Yet not a single appellate court has embraced petitioners' novel departure from McDonnell. It is noteworthy that each of the cases cited by petitioners in fact considers plaintiff's pretext claims.[13] Further, other courts which have

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[12] The merits of Owens' ADEA showing of qualification were not before the court of appeals and the Housing Authority abandoned its appeal of the district court's holding on that issue. Instead, the court of appeals properly considered the issue of qualification only in the context of its collateral estoppel holding.

[13] See, e.g., the cases cited at Petition at 14-16 (Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988) (found that plaintiff made out prima facie case; case turned on whether plaintiff proffered enough evidence to suggest that defendant's reasons for dismissal were pretextual to survive defendant's motion for summary judgment); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 244 (4th Cir. 1982), cert. denied, 459 U.S. 1205 (1983) (assumed that plaintiff met prima facie burden of proving discrimination; case hinged on whether defendant carried its burden to dispel the mandatory presumption); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 292 (8th Cir. 1982), cert. denied, 459 U.S. 1205 (1983) (case hinged on whether defendant's reason for termination was a pretext for age discrimination); Wilkins v. Eaton Corp., 790 F.2d 515 (6th Cir. 1986) (found that plaintiff had satisfied the first stage prima facie burden under the McDonnell Douglas test; holding hinged on whether plaintiff could show that the stated reason for his dismissal was a mere pretext for what was in truth a

(continued...)

considered misconduct charges adjudicate the defense in the context of the defendant's rebuttal to the plaintiff's prima facie presumption of discrimination. See, e.g., Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990) (defendant's proffered reasons for dismissal, misconduct and insubordination, considered in the context of defendant's rebuttal; plaintiff offered opportunity to show pretext); Jalil v. Avdel Corp., 873 F.2d at 707 (insubordination by itself does not preclude showing of qualification at the prima facie stage, but may be raised to rebut plaintiff's prima facie case); Brown v. Parker-Hannifin Corp., 746 F.2d 1407, 1411 (10th Cir. 1984) (insubordination considered in context of defendant's burden of articulating a legitimate, non-discriminatory reason for dismissal).

Thus, the test petitioners now propose would require this Court to abandon its well-considered and well-established three stage burden-shifting test and replace it with a test that both undermines the essential purposes of the McDonnell Douglas analytical framework and finds absolutely no support in any of

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[13](...continued)
discriminatory purpose); Danielson v. City of Lorain, No. 90-3666, 1991 U.S. App. Lexis 15252 (6th Cir. July 16, 1991) (unpublished decision, Petition at A36-A42) (accepted, arguendo, that plaintiff had made out prima facie case, using "employer's reasonable expectations" test; employer's poor work performance considered in context of defendant's rebuttal); Meiri v. Dacon, 759 U.S. 989 (2d Cir.), cert. denied, 474 U.S. 829 (1985) (asserted that plaintiff's prima facie burden was "de minimis"; found that plaintiff had established prima facie case; affirmed the district court's grant of summary judgment because plaintiff failed to show pretext)).

the circuits. Petitioners are therefore unable to establish any basis for issuance of the writ.

POINT III

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE DISTRICT COURT ERRED IN FAILING TO FIND JURISDICTION OVER OWENS' CLAIM OF RETALIATION WHICH WAS REASONABLY RELATED TO HER EEOC CHARGES OF DISCRIMINATION

The court of appeals properly held that the district court had jurisdiction to hear Owens' unfiled claim of retaliation which was reasonably related to the charges of discrimination previously filed with the EEOC. This "reasonable relationship" standard, applied by the court of appeals to determine whether the district court had jurisdiction over the claim of retaliation which Owens' had failed to file with the EEOC, is consonant with the standards applied by every other circuit in the country. Moreover, every court of appeals' decision cited by petitioners addressing these facts held, just as the court of appeals held, that district courts have similar jurisdiction over reasonably related claims of retaliation even if those retaliation claims were not filed with the EEOC. Thus, no confusion over this issue exists in the circuits that would warrant this Court's attention.

In the Second Circuit, it is well settled that in order for the district court to have jurisdiction over a charge asserted under ADEA or Title VII, the charge either must first have been filed with the EEOC or must be "reasonably related to the allegations of an initial claim that was properly filed."

Goodman v. Heublein, Inc., 645 F.2d 127, 131 (2d Cir. 1981) (ADEA); Kirkland v. Buffalo Bd. of Educ., 622 F.2d 1066 (2d Cir. 1980) (Title VII). The court of appeals applied this rule to respondent Owens' retaliation claim and held that it was "'reasonably related' to [her] EEOC filing. . ." Owens III, 934 F.2d at 411; Petition at A10. All courts of appeals that have considered whether a district court may exercise jurisdiction over an unfiled claim also consider the relationship between the unfiled charge and the filed claim by applying the reasonable relationship test or a version thereof.

There is no conflict in the circuits over the test. The reasonable relationship test is explicitly applied in the First, Second, Seventh, Eighth, Ninth and Tenth Circuits as well as the District of Columbia.[14] See Walters v. President & Fellows of Harvard College, 616 F. Supp. 471, 475 (D. Mass. 1985)[15] ("civil action may also include 'relief for incidents not listed in his original charge to the EEOC . . . [which are] like or reasonably related to the allegations of the EEOC charge'") (citation omitted); Goodman v. Heublein, Inc., 645 F.2d 127, 131 (2d Cir. 1981) ("claimant need not file additional claims . . . when those claims, arising subsequent to the initial filing, are reasonably related to the allegations of an initial

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[14] The Petition itself recognizes that the "reasonable relationship" standard is explicitly applied in four circuits, the Sixth, the Eighth, the Ninth and the Tenth, however, it overlooks the Second and Seventh Circuits as well as the District of Columbia. Petition at 20.

[15] The First Circuit has not addressed this issue.

claim that was properly filed"); Steffen v. Meridian Life Ins. Co., 859 F.2d 534, 544 (7th Cir. 1988), cert. denied, 491 U.S. 907 (1989) ("claims are cognizable in a civil action if they are 'like or reasonably related to the allegations of the charge and growing out of such allegations'") (citation omitted); Wentz v. Maryland Casualty Co., 869 F.2d 1153, 1154-55 (8th Cir. 1989) ("claims are cognizable. . . if the allegations in the judicial complaint are 'like or reasonably related to' the timely filed administrative charges") (citation omitted) ; Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973) ("the judicial complaint . . . may encompass any discrimination like or reasonably related to the allegations of the EEOC charge") (citation omitted); Brown v. Hartshorne Public School Dist. #1, 864 F.2d 680, 682 (10th Cir. 1988) ("judicial complaint nevertheless may encompass any discrimination like or reasonable related to the allegation of the EEOC charge"); Loe v. Heckler, 768 F.2d 409, 420 (D.C. 1985) (holding that post-charge conduct is reasonably related to previously filed charges and can be considered by court).

A similar test is applied in four other circuits, the Third, the Fourth, the Sixth and the Eleventh. See Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984) ("relevant test. . . is whether the acts alleged. . . are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom"); King v. Seaboard Coast Line R.R. Co., 538 F.2d 581, 583 n.2 (4th Cir. 1976) (suit filed may encompass "the discrimination stated

in the charge itself or developed in the course of a reasonable investigation of that charge"); Mlinaric v. Parker Hannifin Corp., No. 87-3112, 1988 U.S. App. Lexis 10694 (6th Cir. filed Aug. 5, 1988) (unpublished decision, Petition at A43-A50) (complaint is limited "to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination") (citation omitted); Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988) ("scope of a judicial complaint is defined by the scope of the EEOC investigation that 'can reasonably be expected to grow out of the charge of discrimination'") (citation omitted).[16]

Furthermore, as petitioners concede, the rules of the remaining courts of appeals do not conflict with the court of appeals' decision below. Petition at 22. Accordingly, a review of the courts of appeals cited by petitioners demonstrates unequivocally that no confusion exists over the test.

Petitioners attempt to create a conflict by mischaracterizing the court of appeals' reasonable relationship test as a "per se" rule, a characterization that is unsupported

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[16] Petitioners mistakenly emphasize superficial variations in the language of the courts in an attempt to allege a conflict. These "variations" are not only insignificant, but they are not even considered variations by any of the courts cited by petitioners. In fact, courts use the varying language interchangeably to refer to the same factual inquiry. See, e.g., Walters v. President & Fellows of Harvard College, 616 F. Supp. 471, 475 (D. Mass. 1985).

by the language or the thrust of the court of appeals' opinion.[17] Petition at 22, 23. The court of appeals specifically held, in accordance with Second Circuit precedent, that there must exist a reasonable relationship between the unfiled retaliation charge and the filed charge of discrimination. Nowhere in the court of appeals' decision does the court discard the reasonable relationship test. On the contrary, the court of appeals properly found that Owens' retaliation charge is reasonably related to the previously filed charge of discrimination because the "allegations of retaliation are seen as stemming from the earlier discriminatory incident, including plaintiff's attempt to vindicate her federal rights against discrimination." Owens III, 934 F.2d at 411, Petition at A10-A11.

Just as there is no conflict in the circuits over the standard by which an unfiled claim may be brought within the jurisdiction of the court, no conflict is created by the court of

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[17] Indeed, the petitioners seem to have confused the decision below with Gupta v. East Texas State University, 654 F.2d 411 (5th Cir. 1981). Assuming arguendo that Gupta applies a "per se " rule, petitioners' attempt to align the court of appeals' decision with the Fifth Circuit decision is unfounded. Although both circuits held that the district court could hear the unfiled retaliation claim, the underlying rationale for those decisions differs drastically. The Fifth Circuit reasoned that retaliation claims which arise subsequent to the initial filing fall within the ancillary jurisdiction of the court thereby alleviating the need to exhaust administrative remedies. Quite different from the Fifth Circuit's grounds, the court of appeals based its decision on the finding that Owens' retaliation claim was reasonably related to the initial charge.

appeals' application of that standard in finding that Owens' unfiled claim of retaliation is within the jurisdiction of the district court. In holding that the retaliation claim is reasonably related to the charge of discrimination filed, not only was the court of appeals' decision consistent with prior Second Circuit decisions,[18] but its decision is consistent with the decisions of other circuit courts faced with the same facts.

In the present case, Owens experienced acts of discrimination which led her to write letters to her supervisors' supervisors, contact mediation agencies, contact the Housing Authority's internal office for equal employment opportunity and engage in similar conciliatory actions. Owens' complaints were ineffective in preventing additional acts of discrimination. Subsequently, the Housing Authority initiated disciplinary proceedings against Owens and she was forced to file formal charges with the EEOC. After Owens' EEOC complaint was lodged, the Housing Authority committed an additional retaliatory act of discrimination against her: after beginning settlement discussions over a possible plea-bargain to compromise the

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[18] The reasonable relationship rule was adopted by the Second Circuit in Kirkland v. Buffalo Board of Education, 622 F.2d 1066, 1068 (2d Cir. 1980)("issuance of a 'right to sue' letter . . . does permit a court to consider claims of discrimination reasonably related to the allegations in the complaint filed with the EEOC"). In Goodman v. Heublein, Inc., 645 F.2d 127, 131 (2d Cir. 1981), the court of appeals found jurisdiction over a similar retaliation claim not filed with the EEOC, recognizing that "we have held that a claimant need not file additional claims with the federal administrative agency when those claims, arising subsequent to the initial filing, are reasonably related to the allegations of an initial claim that was properly filed."

disciplinary charges, counsel for the Housing Authority informed counsel for Owens that explicitly because Owens had filed a complaint with the EEOC, the Housing Authority refused to continue settlement negotiations with Owens. Indeed, this conduct was reported not by Owens but by Owens' former counsel, a third party. Owens was eventually terminated as a result of these charges.

In every case cited by petitioners where the sequence of events was analogous to the present case, the courts have consistently held, as the court of appeals did here, that the unfiled retaliation claim was within the courts' jurisdiction. For example, in Wentz v. Maryland Casualty Co., 869 F.2d 1153 (8th Cir. 1989), the Eighth Circuit held that the unfiled retaliation claim which arose the day after a charge of discrimination was filed with the EEOC, was properly before that court because the retaliation claim "grew out of the discrimination charge . . . filed with the EEOC." Id. at 1154. See also Brown v. Hartshorne Public School Dist. #1, 864 F.2d 680 (10th Cir. 1988) (original filed charge of discrimination based on school district's failure to hire grievant encompassed, due to reasonable relationship between claims, subsequent unfiled allegations of retaliatory discrimination based on school district's continued refusal to hire grievant); Gupta v. East Texas State Univ., 654 F.2d 411 (5th Cir. 1981) (court could exercise jurisdiction over grievant's claim of retaliation based on notification of non-renewal of teaching contract which

occurred subsequent to grievant's filing of charge with EEOC); Walters v. President & Fellows of Harvard College, 616 F. Supp. 471 (D. Mass. 1985) (due to relationship between initial charge and subsequent charge of retaliation, initial charge of discrimination filed with various commissions encompassed acts of retaliation, such as involuntary transfer and discharge which occurred shortly after charge was filed); see also Baker v. Buckeye Cellulose Corp., 856 F.2d 167 (11th Cir. 1988) (court could exercise jurisdiction over request for injunctive relief to enjoin alleged retaliation occurring as a result of discrimination suit even though retaliation charge never filed); Aronberg v. Walters, 755 F.2d 1114 (4th Cir. 1985) (court had jurisdiction over request for injunctive relief preventing future retaliatory acts, despite fact that no claim for retaliation was before court); Waiters v. Parsons, 729 F.2d 233 (3d Cir. 1984) (filed retaliation claim encompassed unfiled claim alleging discriminatory discharge occurring subsequent to EEOC filing).[19]

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[19] Every case cited by petitioners for the proposition that the court of appeals' decision conflicts with other circuit court decisions contains significant factual distinctions from the case at bar. Indeed, the Seventh Circuit in Steffen v. Meridian Life Insurance Co., 859 F.2d 534 (7th Cir. 1988), cert. denied, 491 U.S. 907 (1989), distinguished those cases "where the alleged retaliation arose after the charge of discrimination had been filed", as in the case before this Court, from the cases like Steffen where the claim of retaliation occurred before the initial filing. Id. at 545 n.2. In several other cases cited by petitioners, no causal relationship was established between the original EEOC filing and the retaliation because of the intervention of significant and decisive events: Stewart v. United States Immigration and Naturalization Service, 762 F.2d 193 (2d Cir. 1985) (claimant's suspension due to

(continued...)

Furthermore, petitioners mistakenly rely on the Second Circuit's decision in Stewart v. United States Immigration and Naturalization Service, 762 F.2d 193 (2d Cir. 1985). Contrary to petitioners' claims, the decision in Stewart demonstrates the Second Circuit's cohesion with its sister circuits in applying the reasonable relationship test and firmly establishes that the Second Circuit does not apply a per se rule. In Stewart, after the claimant and two co-workers filed with the EEOC a charge of race discrimination on the basis of unequal pay, conditions and performance ratings, claimant shot an individual with his service revolver while he was off duty. The shooting resulted in several criminal charges of reckless endangerment and assault being brought against him. While the criminal charges were pending, he was suspended. The Second Circuit held that the claimant's subsequent unfiled charge of retaliation based on the suspension was not within the court's jurisdiction because the suspension was not reasonably related to the claimant's race discrimination

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[19](...continued)
pending criminal charges relating to improper use of service revolver found not reasonably related to charge of race discrimination previously filed); Mlinaric v. Parker Hannifin Corp., No. 87-3112, 1988 U.S. App. Lexis 10694 (6th Cir. filed Aug. 5, 1988) (unpublished decision, Petition at A43-A58) (charge of retaliation based on acts occurring after two year injury layoff, where initial charge of discrimination filed with EEOC related to acts occurring prior to two year injury layoff, were not sufficiently related to come within court's jurisdiction.); Sherman v. Standard Rate Data Serv., Inc., 709 F. Supp. 1433 (N.D. Ill. 1989) (claimant signed general release for initial charge thereby precluding argument that jurisdiction existed over retaliation charge due to alleged relationship between original charge and subsequent charge of retaliation.)

claim. Thus, the very case relied upon by petitioners to prove that the Second Circuit applies a per se rule actually proves just the opposite: the Second Circuit adheres to the reasonable relationship test and does not apply a per se rule.

Finally, the court of appeals' decision below is consistent with Congressional intent and the mandates of both Title VII and ADEA. ADEA provides that "[i]t shall be unlawful for an employer to discriminate against any of his employees . . . because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d) (West 1985). Title VII has a similar provision. 42 U.S.C. § 2003e-3(a) (West 1981). In order to preserve the remedial purposes of Title VII and ADEA, this Court has consistently demanded that the technical provisions of these statutes be construed liberally. In Love v. Pullman Co., 404 U.S. 522 (1972), this Court declined to read literally a filing provision of Title VII because "[t]o require a second 'filing' by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Id. at 526. Accord Zipes v. Trans World Airlines Inc., 455 U.S. 385, 397 (1982). A requirement of separate EEOC filings for each and every incident occurring after the initial filing would, contrary

to the remedial purposes of Title VII and ADEA, erect unnecessary procedural barriers to private prosecution of certain discrimination claims. Oubichon v. North American Rockwell Corp., 482 F.2d at 571.

The court of appeals remained faithful to the mandates of Title VII and ADEA by recognizing that in the present case, where the EEOC was aware of the disciplinary charges pending while its investigation was underway and where Owens wrote to the EEOC upon learning of her discharge and the refusal of the Housing Authority to negotiate her termination,[20] a decision requiring her to file a second charge with the EEOC would bar the relief intended to be available to a grievant such as Owens. Since as a layperson, Owens had no reason to believe that the EEOC would not consider the retaliatory conduct in response to her EEOC filing as part of that investigation, the court of appeals properly determined that her retaliation claim should be heard.[21] Indeed, a second filing would erect a needless procedural barrier which only would serve to withhold relief from the very person intended to be aided by Title VII and ADEA.

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[20] Petitioners' allegation that Owens first asserted her retaliation twenty-seven months after the fact, Petition at 24, overlooks evidence in the record before the court of appeals that Owens sent a letter on June 5, 1984 to the EEOC and Housing Authority in which she describes the acts of retaliation which form the basis of her claim. App. at 1a.

[21] There was no evidence before the court of appeals that the EEOC had not investigated the plea-bargaining issue in its investigation of the disciplinary charges themselves, since the record indicated that the EEOC file was destroyed before petitioners made their claim that the EEOC had not investigated the charges. App. at 3a.

Finally, petitioners misapprehend the purpose of Title VII and ADEA by arguing that the failure to file a charge of retaliation bypasses conciliation and therefore conflicts with congressional intent. On the contrary, in those cases where the employer continues to discriminate against the employee after a charge of discrimination has been filed with the EEOC, it is the employer's continued acts of retaliation, not the failure to file an additional charge, which destroys the possibility of conciliation. Nowhere is this more apparent than in the present case: Owens filed a charge of discrimination against the Housing Authority, which filing was met with the Housing Authority's flat refusal to continue ongoing negotiations with Owens precisely because she filed a charge with the EEOC. It is exceedingly peculiar that petitioners rely on the conciliatory policy behind ADEA and Title VII when its own legal counsel, by ending his discussion of possible conciliation of the charges against Owens, demonstrated that upon notification of the EEOC claims, all conciliation between Owens and the Authority was ended.

Notwithstanding petitioners' invocation of the conciliation policy, the court of appeals' decision to hear the retaliation charge is harmonious with other circuits in finding that "once the EEOC has tried to achieve a consensual resolution of the complaint, and the discrimination continues, there is minimal likelihood that further conciliation will succeed." Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984). Accordingly, the court of appeals correctly held that Owens'

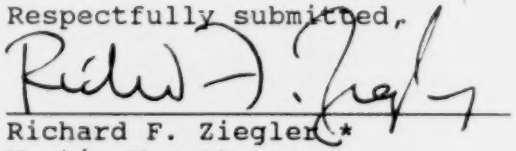
retaliation claim falls within the jurisdiction of the court. Petitioners' assertion that Owens' failure to file a new charge with the EEOC hampered conciliation is meritless.

Therefore, the court of appeals properly found that the claim was reasonably related to the charge of discrimination previously filed, and, in accordance with its sister circuits and Second Circuit precedent, correctly held that jurisdiction over the retaliation claim existed. Any decision to the contrary by the court of appeals would serve only to encourage the very conduct that Title VII and ADEA were designed to prevent.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,



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October 18, 1991

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Letter from Catherine Owens to the New York City Housing Authority Personnel Department, dated June 5, 1984

June 5, 1984 (Hand Delivered)
145 East 39th Street
New York, New York 10016

New York City Housing Authority
250 Broadway
New York, New York 10007

Attention: Ms. Winona Jones
Director of Personnel

Dear Ms. Jones:

This letter is to inform you that your letter hand delivered to me May 30th by Mr. Patrick Coleman, Manager of Carver Houses, is an illegal attempt to remove me from my $23,582 a year job, which I have conscientiously worked at for 7 1/2 years.

On March 14th Mr. Coleman called me into his office and advised me that I had been permanently appointed to Carver Houses (and I have the documentation to prove it). At this time I'd been working at Carver Houses for one year and thought to be both capable and competent by the Manager, Assistant Manager, Housing Assistants and others on the staff. At the same time doing twice as many annual reviews per quarter as the amount scheduled at LaGuardia Houses. At this time I had not been found guilty of any of the charges these two men, John Arakel and Lawrence Lefkowitz, had made (incompetence and misconduct) against me.

If the legal department wants to retry (try this case for a second time) and allow the fifteen to twenty witnesses testify (these witnesses showed up on two separate occasions and were not allowed to be heard by Mr. Weisberger), this can be arranged.

This entire matter, from its inception, February 1983 until the present has been a coverup for Mr. Lawrence Lefkowitz. It is common knowledge that Mr. Lefkowitz, during the entire period I worked at LaGuardia Houses, was unable to come to work on time (appeared to have some emotional or physical problems) and as a result was unable to supervise or check the work (annual reviews, etc.) of the Housing Assistants. This hearing was an attempt (which is also common knowledge) to use me as his scapegoat.

However it couldn't work, his reputation for not coming to work and then not doing his work once he does arrived is widespread.

The business of finding me guilty after not finding me guilty and appointing me to Carver Houses permanently is a retaliation for the case which has been pending at EEOC (Equal Employment Opportunity Commission) since June 1983 and for the information I submitted to them at their request. If Mr. Weisberger wanted me to drop the charges he should have or could have discussed this with me or my attorney and this could have been arranged. My charge of discrimination (6/27/83) and my letter to EEOC dated 3/14/84 are attached for your files.

Retaliation is against the law. And this reversal of their origi- findings (3/12/84) is illegal. I will continue to report to work (Carver Houses) as I have conscientiously done for the past 7 1/2 years.

Ms. Jones I am certain that this attempted illegal procedure is not your doing, however, as Personnel Director your name is on the letter addressed to me, therefore, I have addressed this letter to you.

The two enclosures are to inform you of what is going on. I don't think the right people are aware of what is being attempted by some of Housing's employees.

Miss Catherine Owens

enclosures (2)
cc: EEOC
Attorneys

P.S. Ms. Jones: After closing this letter I decided to attach a short paper I had to research for a Personnel Administration class for the Spring '84 semester. Dr. Gillespie gave me an "A" for the paper and also wrote that it was an excellent report. Her book "Creative Supervision," was used for the course. The reason I'm enclosing this to you? -- to let you know that I had no idea about this agency's grievance procedures and also to advise that this procedure was not used by Local 237 or NYCHA regarding the problems I had been experiencing with these two men (supervisors). This whole matter, if properly handled, could have been resolved at the pre-formal grievance stage, and wasn't.

Miss Owens

Letter from Robert L. Williams of the EEOC
to Plaintiff's counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
[EEOC Symbol] **NEW YORK DISTRICT OFFICE**
90 CHURCH STREET, ROOM 1501
NEW YORK, NEW YORK 10007
(212) 264-7188

January 20, 1988

Cleary, Gottlieb, Steen & Hamilton
One State Street Plaza
New York, New York 10004

Attention: Martha F. Davis

Re: Freedom of Information Act
Request No. 87-12 FOIA # 306-NY

Dear Ms. Davis:

Please be informed that I am unable to grant or deny your request for records in the Equal Employment Opportunity Commission case of C. Owens v. N.C.Y. Housing Authority Charge No. 021-83-3282, as the file has been destroyed in accordance with our agency records retention program.

I regret any inconvenience that may cause you.

Sincerely,

Robert L. Williams
Regional Attorney

RLW/JA/sld